IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 276

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

Petitioner,

vs.

GEORGE M. DONNELLY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Now comes the respondent, George M. Donnelly, (plaintiff and appellee in the Illinois courts), and by and through Ezra L. D'Isa his attorney files, this his brief in opposition to the petition for writ of certiorari prayed for herein by the petitioner, The Pennsylvania Railroad Company, (defendant and appellant in the Illinois courts), and says:

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Illinois Supreme Court is reported in full. (*Donnelly* v. *Pennsylvania R. Co.*, 412 Ill. 115, 105 N.E. 2d 730). The opinion of the Appellate Court of

Illinois, (First District), is likewise reported in full. (*Donnelly* v. *Pennsylvania R. Co.*, 342 Ill. App. 556, 97 N.E. 2d 846.[1] Any opinion rendered by the Circuit Court of Cook County, Illinois, the trial court, is not reported.

II.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Court on the ground that a construction of a Federal Statute is involved (28 U.S.C.A. 1257, (3)—the Safety Appliance Act—45 U.S.C.A. 2). The theory upon which the petitioner seeks certiorari in this Court is grounded upon a false premise,[2] and does not raise a substantial Federal question.[3] The question whether the couplers were in a position to couple automatically on impact, and would thereafter fail to couple, was a question of

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[1] The Illinois Supreme Court in cases of this character, in its discretion, reviews judgments of the Appellate Court on questions of law only. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15), by petitions for leave to appeal from the Appellate Court to the Supreme Court, (Ill. Rev. Stats. 1949, Ch. 110, Pars. 199 and 259.32). The facts as found by the Appellate Court are ordinarily conclusive on the Illinois Supreme Court. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15).

[2] The petitioner cannot legally support his theory that before a violation of Section 2 of the Safety Appliance Act is shown, it must appear that the couplers failed to couple automatically on impact, "after a fair trial" with the couplers in a position to couple. The provisions of the Safety Appliance Act, (45 U.S.C.A. 2) do not so provide, and there are no exceptions. (**O'Donnell v. Elgin, J. & E. Ry. Co.**, 338 U. S. 384; **Carter v. Atlanta & St. Andrews Bay Ry. Co.**, 338 U. S. 430; **Affolder v. New York, Chicago & St. Louis R. Co.**, 339 U. S. 96, 99) This Court in the foregoing cases refused to so construe the Act. **cf., Atlantic City R. Co. v. Parker**, 242 U. S. 56.

[3] This Court has said that before it will grant certiorari, the petition must show that a substantial federal question is involved. (**McArthur v. U. S.**, 315 U. S. 787, 62 S. Ct. 915; **Zucht v. King**, 260 U. S. 174, 176-177)

fact which this Court, will not ordinarily re-examine.[1] This Court has said that its power over state judgments, "is to correct them to the extent they incorrectly adjudicate federal rights."[2] The opinion of the Illinois Supreme Court shows that it construed the provisions of Section 2 of the Safety Appliance Act, (45 U.S.C.A. 2) in conformity with the applicable decisions of this Court. This Court, therefore, should decline jurisdiction.

III.

QUESTIONS PRESENTED.

(a)

There is only one legal issue in this case, *i.e.*, whether the state trial court erred in refusing to direct a verdict for the defendant; and whether the Illinois courts of review erred in sustaining this judgment.

(b)

There is also the related contentions of the defendant, *i.e.*, (i), whether the couplers failed to couple automatically on impact, "after a fair trial"[3] and (ii), whether

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[1] **Just v. Chambers**, 312 U. S. 383, 385, 61 S. Ct. 687; **Milk Drivers' Union v. Meadowmoor Dairies**, 312 U. S. 287, 61 S. Ct. 552; **Great Atlantic & Pac. T. Co. v. Supermarket Eqpt. Co.**, 340 U. S. 147, 153-154, 71 S. Ct. 127. And see also, **Page v. Arkansas Nat. Gas. Corp.**, 286 U. S. 269, 52 S. Ct. 507; **U. S. v. Johnson**, 268 U. S. 220, 45 S. Ct. 496, where this Court held in substance that it would not review on certiorari, fact questions found in respondent's favor by both courts below.

[2] **Herb v. Pitcairn**, 324 U. S. 117, 65 S. Ct. 459.

[3] Liability under the Safety Appliance Act is not predicated upon negligence, but the duty imposed upon the railroad under the provisions of the Act is an absolute one, requiring performance of the appliance on the occasion in question. (**Affolder v. New York C. & St. L. R. Co.**, 339 U. S. 96, 98; 70 S. Ct. 509; **O'Donnell v. Elgin, J. & E. R. Co.**, 338 U. S. 384, 70 S. Ct. 200; **Carter v. Atlanta & St. A. B. R. Co.**, 338 U. S. 430, 433-434)

at the time of the trial attempt to couple, the couplers were actually in a position to couple automatically. These issues are purely factual issues, which were decided adversely to the contentions of the defendant,[1] by the verdict of the jury.

(c)

And the wholly unrelated question of whether the couplers on the cars in question failed to couple automatically by impact, during a switching operation, when an actual attempt was made to couple the cars.[2] If this question was material, it raised only a question of fact which the jury decided adversely to the defendant.[3]

IV.

THE STATUTE INVOLVED.

The statute upon which the plaintiff based his cause of action in the Illinois Circuit Court, was Section 2 of the Safety Appliance Act, (45 U.S.C.A. 2), which is as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be

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[1] **Affolder v. New York C. & St. L. R. Co.**, 339 U. S. 96, 99-100, 70 S. Ct. 509; **Atlantic City R. R. Co. v. Parker**, 242 U. S. 56, 59; **San Antonio Ry. Co. v. Wagner**, 241 U. S. 476, 484.

[2] Under the law there is no legal requirement of this nature in order to establish liability under the Safety Appliance Act. This Court in **Coray v. Southern Pac. R. Co.**, 335 U. S. 520, 523, 69 S. Ct. 275, 276-277 said that the liability of railroad for injuries inflicted, "follows from the unlawful use of prohibited equipment 'not from the position the employee may be in, or the work which he may be doing at the moment when he is injured.'"

[3] The respondent testified that it was a part of his duties, "to couple up trains" (R. 15), and to see that couplers were in a position to couple. (R. 15, 82)

uncoupled without the necessity of men going between the ends of the cars."[1]

V.

SUMMARY OF ARGUMENT.

1. The defendant has changed his legal theories in this Court. However, even on the basis of its changed contentions it is not entitled to certiorari.

2. The evidence was sufficient to support the verdict for the plaintiff, and the trial court correctly submitted the case to the jury; and correctly refused to direct a verdict for the defendant at the close of all of the evidence, or to enter a judgment for the defendant notwithstanding the verdict.

3. It was a question of fact whether there was excessive side or lateral play in the coupler.

4. It was a question of fact under the evidence whether the defendant violated the provisions of the Safety Appliance Act.

5. There is no merit to the contention of the defendant that the accident was caused by the sudden movement of the cars.

6. There is no merit to the contention of the defendant that the court should have directed a verdict because "the switching movement was still in progress and the coupling operation had not commenced."

7. There is likewise no merit to the contention of the defendant that the trial court should have directed a

[1] This court has held in recent cases, "that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." (O'Donnell v. Elgin, J. & E. R. Co., 338 U. S. 384, 390).

verdict because, "No attempt to couple any of the cars in this train had yet been made."

8. The Illinois Supreme Court correctly held that the trial court did not err in refusing to direct a verdict.

9. The *Affolder* case does not sustain the contentions of the defendant, that the trial court should have directed a verdict.

10. In order to establish liability under the Safety Appliance Act, it is not necessary that there be an attempt to couple, and a failure of the couplers to couple automatically by impact.

11. In order to establish liability under the Safety Appliance Act, the law does not require that the plaintiff be engaged in a coupling operation with the intent to couple the cars.

VI.

RESPONDENT'S ADDITIONAL STATEMENT OF THE FACTS.

The statement of facts as made by the defendant is not only incomplete and inaccurate, but it omits facts which are material for the consideration of this Court.

The material facts are simple and for the most part wholly undisputed. If there was any dispute in the facts, the verdict of the jury has resolved all of such facts in plaintiff's favor.[1]

The plaintiff, George M. Donnelly, (respondent), was a yard conductor who had been in the employ of the defendant for many years. At the time of the occurrence he was assigned to defendant's 59th Street Classification

[1] Compare, Lavender v. Kurn, 327 U. S. 645, 652-653; Myers v. Reading Co., 331 U. S. 477, 484.

Yard in Chicago. (R. 10). On July 11, 1948, the plaintiff, as a part of his duties, was engaged in making up a road freight train on Track No. 6 in defendant's yard (R. 13; R. 41). Cars placed and to be placed on that track were "humped in" on that track, *i.e.*, they were released at the top of the hump and permitted to roll down this track by gravity. (R. 39).

At about 9:00 P.M., on the night of July 11, 1948, and just before the occurrence in question, plaintiff was engaged in checking cars which had been "humped in" on track 6, (and were standing on that track at the south end of the yard,—R. 15), to see that the cars were coupled, and if not, (R. 16), to see that the couplers on the cars were in a position to couple.[2] The plaintiff in checking these cars started with the most southerly car on track 6, and proceeded northward between tracks 6 and 7. (R. 15). It was a part of the plaintiff's duty to "couple up trains". (R. 15). Upon the examination of the coupler on the south end of the most southerly car, he noticed that the knuckle was closed, and he used the pin-lifter to open it, "in order to make it convenient for the road engine to make the connection with the first car of the train." (R. 15). Plaintiff then proceeded north examining the couplers of the cars with his lantern. He found that the coupling on the most southerly car, and the car immediately to the north "was made". (R. 15). When he examined the couplers on the next car to the north he observed that "the coupling had not been made." (R. 15). He observed that the north drawbar on the second car, "had been knocked over to the closed position." (R. 16). He found the knuckle of the drawbar on the

[2] Even defendant's own employee, (McCrea—one of its yard conductors (R. 75), testified that he knew plaintiff "was in the south end of the yard." (R. 82); that it was the duty of the "brakeman or conductor to line up draw bars so that the train can couple." (R. 82).

south end of the car immediately to the north of this car, (which would be the third car from the south end), was also in a closed position, and that this drawbar was also three or four inches to the west of the center line of the car.[1] A coupler which was that much out of alignment would not couple automatically by impact. (R. 16). Plaintiff also testified that the drawbar on this car was not "centered"; that a drawbar by reason of the buffer or snubber springs on each side of the drawbar, **if in proper working order**, will return the drawbar to a centered position so that it will couple automatically by impact. (R. 9).

The evidence further shows that cars "humped in" on these tracks move down grade by gravity and collide and couple with cars which are already standing on such tracks. (R. 39).

Two cars had been dropped in on track 6 earlier in the evening, and had rolled down to the south end of that track. (R. 42, 160), and subsequently a refrigerator car was taken from the repair track and permitted to roll down on track 6 by gravity (R. 77; R. 151; R. 161). Plaintiff and his crew had placed all of the cars that were on that track prior to the ocurrence. (R. 43).

Plaintiff when he saw that the knuckles on the drawbars between the second and third car were closed, he first opened the knuckle of the drawbar on the south end of the third car, which would be the "third car from the south" (R. 55). The track at this point was straight. (R. 38-39).

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[1] According to the defendant's own evidence, the lateral play on the "average coupler" is three-fourths of an inch in each direction. (R. 105) The Illinois Supreme Court held that because of this excessive lateral play the jury could have properly found this coupler was defective (R. 189).

Plaintiff testified that when couplers are out of alignment, under the conditions that prevailed in the yard that night, it was the usual custom and practice, to push the coupler to a centered position with the foot. (R. 18).

Plaintiff before attempting to align the coupler on the south end of the third car, with his foot, looked to the north, saw no cars, saw no lights[1] and heard no cars approaching. (R. 17). He, thereupon, put his foot against the drawbar, "and shoved the drawbar over."[2] (R. 18). At that moment, the standing cars on track 6 were struck by a cut of cars that had been humped in on that track without a rider, (contrary to custom), shoving the standing cars so that plaintiff was struck and knocked to the ground, sustaining the loss of his right leg, near the hip. (R. 19).

After the occurrence, the cars on track 6 were all coupled together. (R. 119; R. 121; R. 147).

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[1] Although it was a custom and practice of the defendant if men were working in the yard to send a rider down with a cut of cars (R. 59). No rider was on these cars.

[2] With one knuckle of the drawbar open, and with the couplers in alignment, the couplers were in a position to couple automatically by impact if in proper working order. In **Williamson v. St. Louis-San Francisco Ry. Co.**, 335 Mo. 917, 74 S. E. 2d 583, it was said that couplers, "If in good condition, will couple automatically if the knuckle of one drawbar is open, or if the knuckle of both drawbars are open."

VII.

ARGUMENT.

(1).

The legal theories upon which the defendant seeks certiorari in this Court, are not the theories presented to and passed upon by the Illinois courts. However, even on the theories advanced before this Court the defendant is not entitled to the writ of certiorari.

On page 6 of petitioner's petition, its theories, are set forth in the following paragraph:

> "*This accident was caused by an unexpected movement of cars of which Donnelly himself was in charge.* Actually he was injured by the cut of cars from tracks 12 and 13 coming in on track 6 (R. 80-81). *The switching movement was still in progress and the coupling operation had not commenced.* The cars from track 10 had not yet come in on track 6 (R. 80, 81) when a stop signal, because of Donnelly's injury, was given. *No attempt to couple any of the cars in this train had yet been made.*" (Emphasis in original text)

The theory upon which the petitioner proceeded in the Illinois Supreme Court, is stated by that Court in its opinion, in the following language. (R. 186):

> "The defendant contends that the test of a violation of this section of the Safety Appliance Act is whether the cars, after a fair trial, will couple automatically by impact, assuming the couplers had been placed in their proper position to effect the coupling; that there is no evidence here to show the couplers were in the proper position to couple automatically by impact and no evidence that an attempted coupling had failed, and consequently no proof of a violation of the act. The defendant has extracted this rule from the case of *Affolder* v. *New York, Chicago & St. Louis Railroad Co.*, 339 U. S. 96.

"The defendant's theory seems to require that, before any evidence can be considered as tending to prove a violation, **the evidence must show the knuckles and drawbar were properly aligned and a futile attempt made to effect a coupling.** We do not interpret the cases cited by defendant as so holding. The effect of such a rule would be to require actual proof of the violation before the jury could consider the evidence." (Emphasis supplied)

This Court has said that it will not decide a question not decided by the State Supreme Court,[1] or presented to or passed upon by the State Court.[2]

Thus, the defendant seeks to litigate in this Court a question of the interpretation of the Safety Appliance Act, which was not presented to, or passed upon by the Illinois Supreme Court.

However, we will demonstrate, that the factual basis upon which the defendant predicates these new theories, is not sustained by the record, and that such theories, are in fact without legal merit.

(2)

The defendant has misstated and misinterpreted the facts in the endeavor to create the false impression in this Court that a substantial federal question is involved.

Since the defendant grounds his basic premise, (so it says), on a question of law, *i.e.*, whether the trial court erred in refusing to either, (a) direct a verdict for the defendant, at the close of all of the evidence, or (b), to enter a judgment notwithstanding the verdict in its favor, the legal effect of the evidence under such circumstances, will have to be construed in accordance with well settled principles.

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[1] **Owens v. Union Pac. R. Co.**, 319 U. S. 715, 724-725, 63 S. Ct. 127.

[2] **Congress of Ind. Org. v. McAdory**, 325 U. S. 472, 477, 65 S. Ct. 1395, 1398; **U. S. v. Fleischman**, 339 U. S. 349, 365, 70 S. Ct. 739.

(a)

The verdict for the plaintiff and against the defendant was a finding in favor of the plaintiff of all the issues submitted to the jury for determination. (*Glenn* v. *Sumner*, 132 U. S. 152, 157; *Erie R. Co.* v. *Schleenbaker*, 257 Fed. 667, 671, cert. den. 250 U. S. 666; *Anthony Itter Brick Co.* v. *Ashby*, 100 Ill. App. 604, 607, aff'd, 198 Ill. 562.)

(b)

On motions of this character, all controverted questions of fact must be resolved in favor of the plaintiff. (*Bay Island Drainage and Levee Dist.* v. *Nussbaum*, 388 Ill. 131, 134, 56 N.E. 2d 615, 616.)

(c)

On motions of this character, the legal questions presented is the single question, whether there is any evidence, which standing alone, and taken with all its intendments most favorable to the plaintiff tends to prove the material issues in the case. (*Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 130, 94 N.E. 2d 847). And it is only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. (*Lavender* v. *Kurn*, 327 U. S. 645, 652-653, 66 S. Ct. 740; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 653; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35).

In this connection it should be noted that the defendant submitted to the jury, the following issues of fact to be determined by it.

(3)

The question of whether there was excessive lateral or side play in the coupler was a question of fact for the jury.

At the request of the defendant the trial court submitted to the jury the following instruction, (Defendant's Given Inst. No. 12) (R. 169):

> "Side play in a coupler according to a standard and generally accepted use on railroads does not constitute a defect in the coupling device, **unless there is a greater play than is necessary for safe operation.**" (Emphasis supplied)

(4)

The question of whether the defendant violated the provisions of the Safety Appliance Act by furnishing a defective coupler was also a question of fact.

At the request of the defendant, the trial court gave the following instruction, with respect to whether the defendant had violated the provisions of the Safety Appliance Act. (Defendant's Given Inst. No. 21 (R. 171-172):

After setting forth the provisions of Section 2 of the Safety Appliance Act, this instruction concluded, as follows:

> "You are instructed that a railroad has complied with this section when it equips cars with couplers designed to couple automatically on impact without the necessity of men going between ends of cars, which couplers are in general use among well-regulated railroads, and a railroad cannot be held responsible for injuries resulting proximately from failure of couplers to couple on given occasions **unless such failure proximately results from a defect in the coupler.**" (Emphasis supplied).

With respect to the elements which the plaintiff was required to prove to establish liability on the part of the defendant, the defendant instructed the jury in part, as follows, (Defendant's Given Inst. No. 20), (R. 171):

> "* * * Before the plaintiff can recover against said defendant, he must prove by a preponderance or greater weight of the evidence that while the plaintiff was engaged in the act of adjusting a drawbar on the third car from the southerly end on track six in the 59th Street Yard, that The Pennsylvania Railroad Company negligently **violated the Safety Appliance Act by permitting a car to be used on its line that would not couple automatically by impact and that such negligent violation, if any, contributed in whole or in part to injure the plaintiff.**" (Emphasis supplied).[1]

Thus the defendant submitted to the jury, the question of whether there was too much side or lateral play in the coupler, so as to make it a defective coupler, and the factual questions of whether the coupler in question was violative of the provisions of the Safety Appliance Act. The verdict of the jury found all these issues, (which the defendant submitted to it by its own instructions), in favor of the plaintiff and against the defendant. Under the rules of law set forth above the verdict of the jury, approved by the judgments of the Circuit Court of Cook County, the Appellate Court of Illinois, (First District), and of the Supreme Court of the State of Illinois, should not be disturbed.

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[1] This instruction was much more favorable to the defendant than it was entitled to under the law. Negligence is not an issue in a Safety Appliance Act case. See cases cited under footnote 1, p. 3.

(5)

There is no merit to the present contentions of the defendant, that it should be granted a writ of certiorari by this Court.

(a)

The accident was not caused by an unexpected movement of the cars of which movement Donnelly was in charge, as defendant contends.

It is difficult to see any merit to this contention if the statement made by the defendant was true, (which it is not). If the injury resulted from a violation of Section 2 of the Safety Appliance Act by furnishing couplers which did not, and would not couple automatically by impact, without the necessity of Donnelly going between the cars, the so called "unexpected movement" of the cars was not the proximate cause of Donnelly's injuries.

However, the assertion made by the defendant that there was "an unexpected movement" of the cars is factually untrue.

Here are the facts. The plaintiff left, McCrea, defendant's field man or hind brakeman in the north end of the yard. McCrea was to pick up six or seven cars, on another track and drop them in on track 6. (R. 80). The plaintiff, then went to the south end of the yard. (R. 13; R. 45). The defendant has not suggested in any court, that the plaintiff when he left McCrea and went to the south end of the yard, was not in the performance of his duties as yard conductor for the defendant. In fact, any such contention would be absurd, for the record shows without dispute that after the plaintiff left McCrea, he went to the south end of defendant's 59th Street Yard and there performed the following services for the defendant:

(i) He lined up the switches so that the road engine could get in on track six and pick up the train that was being assembled on that track. (R. 14).

(ii) He then went to the most southerly car on track six, closed the angle-cock on the air line of that car, and using the pin-lifter of that car he opened the knuckle of the south drawbar to make "it more convenient for the road engine to make connection with the first car of the train." (R. 15).

In connection with his duties in assembling this road freight, the plaintiff testified, (R. 15) that "It was a part of my duty to couple up trains." The plaintiff further testified, (R. 47) that, "It is not necessarily a fact that the coupling of the cars and the final checking of the train was not done until I had completely made up the train and the caboose had been attached. That is not always the practice. *I have done it both ways.*" McCrea, the field man or hind brakeman of defendant's train crew, testified, (R. 84):

"Mr. White: Q. When is it that you do any adjusting of any couplers or draw bars?

"A. Well, you can—it all depends on just how you are going to make your train up. You would be notified or told by a conductor to walk the track and see if there are any openings in it, and if you do that, naturally, if you come down and **you will see maybe a couple of knuckles closed and you will automatically reach in and open that knuckle, knowing that you will be in there to couple that track. That will save you that much work later on and you will proceed down further to see if there are any more openings.**" (Emphasis supplied).

This same McCrea further testified, (R. 82), "I knew that **Donnelly had to go to the south end of the yard.** It is **the duty** of the brakeman or the conductor **to line up draw bars so the train can couple.**" (Emphasis supplied).

There was a custom in effect in the yard, that "one never allows a cut of cars to come down (in the yard), without a man riding and directing them, without signal from the man in the yard, if in the clear." (R. 59). Admittedly this cut of seven cars which were being humped in track 6, and which ran into the cars already standing on that track, (and by reason of which the plaintiff lost his leg), were sent in without a rider and without signal, contrary to practice.

In view of this evidence, we suggest that it is absurd to contend that plaintiff's injuries were sustained as a result of an "unexpected movement of cars."

(b)

There is no legal merit to the contention of the defendant, that the trial court should have directed a verdict, or in any event entered a judgment notwithstanding the verdict, because "the switching movement was still in progress and the coupling operation had not commenced."

This premise wholly ignores the theory of liability under the Safety Appliance Act.[1] Liability under this Act is not dependent upon the progress of the switching movement, or the commencement of the coupling operation.[2] The basic query to determine liability under the Safety Appliance Act is, (a) was the appliance defective, or did it fail to function on the occasion in question, (b)

[1] The duty upon the railroad under this Act is an absolute one, requiring performance of the appliance on the occasion in question. Due care or negligence is not an issue under this Act. **O'Donnell v. Elgin, J. & E. R. Co.**, 338 U. S. 384; **Carter v. Atlantic & St. A. B. R. Co.**, 338 U. S. 430.

[2] Liability follows from the use of the prohibited equipment, "not from the position the employee may be in, or the work which he may be doing at the moment when he is injured." **(Coray v. Southern Pac. R. Co.**, 335 U. S. 520, 523).

and was the defect or functional failure of the appliance "a contributory proximate cause of the injury."[1]

Under the preceding heading, we outlined the duties of the plaintiff in connection with making up of this road freight train on track six. Even if there was any dispute with respect to these duties, or plaintiff's performance thereof, prior to the time of this occurrence, the verdict of the jury has settled these questions in plaintiff's favor.

It was the duty of plaintiff, (as we pointed out under the preceding heading), to "couple up trains" and to see that draw bars were lined up so that the cars would couple.

The evidence shows that cars humped in on track six, collided with, and coupled onto cars standing on that track. (R. 39).

When the plaintiff first observed the draw bar on the north end of the second car, he saw that it had been "knocked over to a closed position." (R. 16).[2] At the same time he observed that the draw bar on the south end of the third car was three or four inches west of center line of the car. (R. 16).

The plaintiff further testified that this draw bar in the position which he saw it was not centered, that "a coupling device when it was in proper working order would center itself." (R. 16).

The defendant's own evidence shows that the lateral play or movement of a draw bar "is three-quarters of

[1] Carter v. Atlanta & St. A. B. R. Co., 338 U. S. 430, 435, cf., Coray v. Southern P. R. Co., 335 U. S. 520, 523.

[2] The plaintiff testified in this respect, (R. 16) "With a draw bar in that position (three or four inches west of the center line of the car), they will not couple automatically by impact because the solid side of the draw bar, the jaw, would strike the closed face of the knuckle on the south car."

an inch either way." (R. 105). The Supreme Court of the State of Illinois favored the defendant in finding (R. 189): "that the usual side play of a draw bar was 1½ to 2 inches while the draw bar plaintiff attempted to adjust was 3 or 4 inches out of line, so far out of line that a coupling could not be effected, we are of the opinion that that alone would be sufficient evidence to go to the jury for them to determine if the permissible side play was greater than needed and a violation of the statute."

It should be noted from the evidence above that plaintiff's evidence showed that the draw bar was three or four inches west of the center line of the car, so that the lateral play on this draw bar was not three or four inches as found by the Supreme Court, *but actually had a lateral play of six to eight inches.*[1]

As we pointed out under our additional statement of facts, the plaintiff when he saw this draw bar was out of alignment, knew that a coupling could not be effected automatically by impact with the couplers in this position, so he first opened the knuckle of the draw bar on the south end of the third car, (R. 55), and then he put his foot on this draw bar, (on the south end of the third car), and pushed it over to a centered position so that it would couple. At that time, the cut of seven cars dropped in on track six, without a rider, (contrary to custom), crashed into the standing cars, knocked the plaintiff down, and cut off his leg near the hip.

Under these facts, we feel justified in suggesting to this Court that the contention of the defendant that, "The switching movement was still in progress and the coupling operation had not commenced," is absurd.

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[1] In this connection, it is interesting to note that the defendant throughout its petition, (p. 7; p. 13; p. 15; p. 16;) states to this Court as a fact that this draw bar was "slightly off center"; slightly misaligned; "slightly out of alignment". We suggest that a coupler that has a lateral play of six to eight inches instead of one and one-half to two inches is more than "slightly off center" as defendant suggests.

(c)

There is likewise no legal merit to the further contention of the defendant that the trial court should have directed a verdict for the defendant, or in any event entered a judgment in its favor, notwithstanding the verdict of the jury, because, "No attempt to couple any of the cars in this train had yet been made."

It would serve no useful purpose to repeat the evidence which we have adverted to under our "additional statement of the facts" or under the preceding headings, to demonstrate the fallacy of the defendant's contention in the foregoing respects.

In the first place, it is of no consequence, whether there had been an attempt to couple any of the cars, in determining if the appliance was in fact defective, or failed to function, if such defect or failure was a contributory proximate cause of the injuries sustained by the plaintiff.

As we have shown above, plaintiff at the time of his injuries was in the performance of his duties, *i.e.*, centering a draw bar, which was defective in at least two respects, (a), it failed to center itself, and (b), it had too much lateral play. These were both factual questions which the Illinois Supreme Court correctly found were properly submitted to the jury for determination; and that such factual determination by the jury should not be set aside.

(6)

The Illinois Supreme Court did not err in holding that the Illinois Circuit Court correctly refused to direct a verdict for the defendant at the close of all of the evidence, or to enter a judgment for the defendant notwithstanding the verdict of the jury.

The Illinois Supreme Court in its opinion in this case, approved the reasoning of this Court in *Atlantic City Railroad Co.* v. *Parker*, 242 U. S. 56, saying, (R. 188):

> "The court there further said 'If couplers failed to couple automatically upon a straight track,[1] it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in **the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law.**" Applying this reasoning to that portion of plaintiff's evidence in the instant case which was to the effect that the usual side play of a drawbar was 1½ to 2 inches while the drawbar plaintiff attempted to adjust was 3 or 4 inches out of line, so far out of line that a coupling could not be effected, we are of the opinion that that alone would be sufficient evidence to go to the jury for them to determine **if the permissible side play was greater than needed and a violation of the statute.**" (Emphasis supplied).

In addition the Illinois Supreme Court found that there was other evidence in the case which would also have carried the case to the jury, that court said, (R. 189):

> "There was also evidence that springs were sometimes used or required, but that none were on these cars, and evidence that the mechanism of the refrigerator was rusted. It seems to us that **there was ample evidence to go to the jury for it to determine if there had been a violation of the act.**" (Emphasis supplied).

[1] The track at the scene of this accident was straight (R. 38-39).

In *Carter* v. *Atlanta & St. A.B.R. Co.*, 338 U. S. 430, 434, said:

> "Once the violation (referring to a violation of the Safety Appliance Act) is established, **only causal relation is in issue.** (Emphasis supplied).

And in this connection, see, *Affolder* v. *N.Y.C. & St. L. R. Co.*, 339 U. S. 96, 98.

This Court has often stated the rules of law for the guidance of state courts, when it is not proper to direct a verdict for the defendant under the Federal Employers' Liability Acts. (*Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 523-524; *Lavender* v. *Kurn*, 327 U. S. 645; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29. Others might be adverted to, but this would serve no purpose, the general rules stated in these cases have been expressly approved and followed by the Illinois Supreme Court.

In the recent case of *Williams* v. *N. Y. Central R. Co.*, 402 Ill. 494, 84 N.E. 2d 299, the Illinois Supreme Court in discussing the question of when a verdict should not be directed in a Safety Appliance Act case, said, (p. 506):

> "In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States, (*Ellis* v. *Union Pacific Railroad Co.*, 329 U. S. 649, 67 S. Ct. 598; *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232), and it is clear from its recent decisions **that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted indeed.** *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 63 S. Ct. 444; *Bailey* v. *Central Vermont Rail-*

road Co., 319 U. S. 350, 63 S. Ct. 1062; *Tennant* v. *Peoria & Pekin Union Railroad Co.*, 321 U. S. 29, 64 S. Ct. 409; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Jesionowski* v. *Boston & Maine Railroad Co.*, 329 U. S. 452, 67 S. Ct. 401; *Ellis* v. *Union Pacific Railroad Co.*, 329 U. S. 649, 67 S. Ct. 598; *Tiller* v. *Atlantic Coast Line Railroad Co.*, 323 U. S. 574, 65 S. Ct. 421." (Emphasis supplied.)

From a discussion of the facts in our additional statement of facts, and the resume of facts under the preceding headings, it is apparent that the Illinois Courts of review (The Illinois Appellate Court and the Supreme Court) did not err in holding that the trial court correctly refused to direct a verdict for the defendant.

(a)

The Affolder case does not sustain the contentions of the defendant that trial court should have directed a verdict in its favor, and the Illinois Supreme Court correctly so held.

The defendant suggests in its brief (p. 24) that the Illinois Supreme Court misinterpreted the opinion of this Court in *Affolder* v. *New York, Chicago & St. Louis R. Co.*, 339 U. S. 96.

The Illinois Supreme Court in discussing this case, (the *Affolder* case), said, (R. 187-188):

"We cannot read this quotation (referring to a quotation in the opinion from the *Affolder* case) from the United States Supreme Court, spoken in affirming judgment for the plaintiff, to require the instant plaintiff to prove that the couplers and drawbars here were in proper position and that the cars failed to couple upon impact before there is any evidence for the jury to consider. It seems to us, rather, that the United States Supreme Court said that proof that the couplers or drawbars were not in proper posi-

tion would constitute a good defense, but whether the defendant had proved this defense was a question of fact for the jury."

And this was what this Court held in the *Affolder* case, when in discussing this feature of the case said, (p. 99):

> "Likewise, the argument of counsel, both for plaintiff and defendant, clearly reveals that the sole question with regard to this issue (the question of whether the couplers failed to couple automatically by impact because of mis-alignment of the drawbars), was whether, after the couplers were placed in an open or proper position, they failed to couple automatically on impact. **The jury, by its verdict, resolved this question against the respondent.** (Emphasis supplied).

Aside from the holding of this Court in the *Affolder* case, this Court has on many prior occasions said that it was a question of fact for the jury to determine, if the couplers failed to couple automatically by impact because of misalignment of the couplers. (*San Antonio & Ark. Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 589, and *Atlantic City R. Co.* v. *Parker*, 242 U. S. 56, 59. It was this latter case upon which the Illinois Supreme Court relied in its opinion, (R. 188), and it is this case which the defendant attempts to distinguish in its brief (p. 29).

Even a cursory examination of the law, will show that the *Parker* case (*Atlantic City R. Co.* v. *Parker*, 242 U. S. 56) has been cited with approval in many subsequent cases, as an authority for the proposition that it is a question of fact for the jury to determine, if the failure of the couplers to couple automatically by impact was due to the misalignment of the drawbars.

In this connection see, *Chicago, St. P. M. & O. Ry. Co.* v. *Muldowney,* 8 Cir., 130 F. 2d 971, 975-976, cert. den. 317 U. S. 700; *Hampton* v. *Des Moines & Cent. I. R. Co.,* 8 Cir., 65 F. 2d 899, 900-901; *Davis* v. *Michigan Central R. R. Co.,* 294 Ill. 355, 128 N.E. 539; *Geraghty* v. *Lehigh Valley R. Co.,* 2 Cir., 70 F. 2d 300, 303-304; *White* v. *Atchison, Topeka & Santa Fe Ry. Co.,* (Mo.), 244 S.W. 2d 26, 29, cert. den. 343 U. S. 915.

To meet this impressive array of authorities, the defendant relies upon three cases, (Petitioner's Br. pp. 21-23).

In the first of these cases, *Chesapeake & Ohio Ry. Co.* v. *Arrington,* (Va.), 101 S. E. 415, the plaintiff was injured while adjusting couplers between the engine and one of the cars, when the engine moved ahead. The Court there said, (p. 418):

> "The *question of fact,* then, to be determined, is whether or not, under the existing circumstances, *it was necessary for the plaintiff to go between the engine and the car to effect the coupling.*" (Emphasis supplied).

This case was reversed on instructions and because the court held the verdict was excessive, and not (as indicated above) because the court submitted the case to the jury.

The next case relied upon by the defendant is *Myers* v. *Reading Company,* 331 U. S. 477. This was a Safety Appliance Act case having to do with an alleged inefficient brake. The District Court entered a judgment notwithstanding the verdict for the defendant, and the Court of Appeals affirmed. This Court held (p. 485) that the railroad was under an "absolute duty" to comply with the provisions of the Safety Appliance Act; that whether the brake was inefficient was a question of fact, and reversed the prior judgments.

The third cited case is *Southern R. Co.* v. *Stewar* Cir., 119 F. 2d 85. In that case the plaintiff was inju when he went between two cars that were uncoupl There was evidence that the plaintiff failed to use pin lifter to open the knuckle of the coupler, and t there was in fact no defect in the coupler. It is intere ing to note, however, that this case was decided on theory that the evidence gave equal support to inconsi ent inferences, and hence proved neither. This legal lo was expressly repudiated by this Court in *Tennant Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35.

(b)

There is no legal merit to the contention of the plai tiff that before a violation of the Safety Appliance Act found to exist, an attempt at coupling must have bee made.

The plaintiff in his brief, (p. 23), says:

> "In the case at bar *no test of the performance o the couplers on either of the cars in question wa ever afforded because no attempt at coupling wa ever made.* (Emphasis in original text).[1]

Aside from the fact, that this statement is not sup ported by the record, it is not a correct statement of the law.

Plaintiff's contention of "prior effort to couple" as a necessary test to determine liability and to show a violation under the Safety Appliance Act, is not new.

The Safety Appliance Act, (Section 2, 45 U.S.C.A. 2), requires that the railroad equip its cars with "couplers coupling automatically by impact • • • without the neces- sity of men going between the ends of the cars."

[1] Under another heading we demonstrated that this is not a correct statement of the facts. (See pp. 17-18 this brief).

The evidence shows that the plaintiff in performance of his duties, saw that the couplers between the second and third cars were out of alignment, and would not, in the position which he saw them, couple automatically by impact. He was, therefore, obliged to go between the cars and adjust or realign the couplers so that they would couple automatically by impact. While he was in the performance of his duties, a cut of cars humped in on track 6, contrary to custom, ran into the standing cars, while he was realigning the coupler, and as a result he lost his leg.

Under almost identical circumstances, the Court of Appeals of the Eighth Circuit, had occasion to consider the question, of the necessity of the proof of prior effort to show a violation of the Safety Appliance Act in *Chicago, St. P. M. & O. Ry. Co.* v. *Muldowney,* 8 Cir., 130 F. 2d 971, cert. den. 317 U. S. 700, and said, (p. 975):

> "If the drawbars were out of alignment to the extent that the coupling could not be made automatically on impact, that condition could only be cured by adjusting in some way these drawbars and that involved some movement of them. This could not be effected by the hand lever, and if the condition existed it was the duty of Muldowney not only to detect it but to remedy it. Assuming for the moment that this condition existed, the jury might well have concluded not only that he observed the condition but that he was in the act of attempting to remedy it. In doing so, it was necessary for him to pass between the ends of the cars. If assumed condition existed, the only good faith effort he could have made to couple necessitated an adjustment of the drawbar. Any attempt to make the coupling without such adjustment would be futile. **Manifestly, the rule as to prior effort cannot, in such circumstances, be applicable.** *Geraghty* v. *Lehigh Valley R. Co., supra* (2 Cir., 70 F. 2d 300); *Hampton* v. *Des*

Moines & Central I. R. Co., 8 Cir., 65 F. 2d 899; *San Antonio & A. P. R. Co.* v. *Wagner, supra,* (241 U. S. 476); *Atlantic City R. Co.* v. *Parker,* 242 U. S. 56, 37 S. Ct. 69, 61 L. Ed. 150." (Emphasis supplied.)

This Court has often said that the duty of the railroad to furnish couplers which will couple automatically by impact is "an absolute one, requiring performance 'on the occasion in question.'" (*Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 98); that the failure of equipment "'to perform as required by the Safety Appliance Act is in itself an actionable wrong * * *'" (*Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 99). And see also, *O'Donnell* v. *Elgin, Joliet & Eastern R. Co.*, 338 U. S. 384, and compare, *Coray* v. *Southern Pac. Co.*, 335 U. S. 520, 523, where this Court said,

> "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation **follows from the unlawful use of prohibited defective equipment** 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.'" (Emphasis supplied).

Under the facts of this case, we suggest that the contention of the defendant that there must have been made an attempt to couple before the Act is violated, is without the slightest legal merit.

(c)

Likewise, there is no legal merit to the contention, of the defendant, that to establish liability under the Safety Appliance Act, the plaintiff must be engaged in a coupling operation.

The defendant urges at several points in his petition and in his brief in substance that the plaintiff had failed

to prove a violation of the Safety Appliance Act because, "The switching movement was still in progress and the coupling operation had not commenced." The defendant urges, if we understand its contention correctly, that the plaintiff must have been engaged in a coupling operation before liability under the Act could arise.

This Court in construing the Safety Appliance Act has effectively destroyed the basis for any such theory. (*Coray* v. *Southern Pac. R. Co.*, 335 U. S. 520, 523; *Brady* v. *Terminal Railroad Association*, 303 U. S. 10. And see, *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384; *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430.

While the foregoing cases should settle this question, it is interesting to note that the identical contention was raised in and considered by the Missouri Supreme Court under facts comparable to those in the present case. In *Smiley* v. *St. Louis-San Francisco Ry. Co.*, 359 Mo. 474, 222 S.W. 2d 481, the Court there said, (p. 484):

> "Defendant here contends that where there is no discoverable mechanical defect in a coupler or pin a violation of the statute can be established only by evidence that 'in a movement *of the car* made for the purpose and with the intent to couple automatically by impact with another car,' it failed to automatically couple. **But the above quoted contention does not appear in the statute. And it is not the judicial function to read those conditions into the statute.**" (Emphasis supplied).

CONCLUSION.

We most respectfully suggest that we have shown that the defendant is not entitled to the writ of certiorari prayed for in its petition, either on the grounds urged

in the Illinois courts, or upon the grounds urged before this Court; that the judgments of the Appellate and Supreme Courts, affirming the judgment rendered in the trial court on the verdict of the jury, finding the defendant guilty and assessing plaintiff's damages in the sum of $65,000.00, was a correct disposition of the case. For these reasons, this Court should deny the writ of certiorari prayed for by the defendant.

Respectfully submitted,

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CERTIORARI DENIED